[97] STRAITS SETTLEMENTS REPORTS

PUBLISHED BY AUTHORITY

Re KAVENA HADJEE MOHAMED YOOSUF, DECD.

ESTATE & TRUST AGENCIES (1927) LTD. v. FATIMAH SHAM BINTE HADJI SAHIB & ORS.

[O.C.J. (Burton Ag. C.J.) October 10, 1935]
[Singapore Originating Summons No. 66 of 1934]
[C.A. (Huggard C.J., Whitley and Terrell JJ.) January 18, 1936]
[Singapore Civil Appeal No. 13 of 1935]

Taking of common account by trustee — Breach of trust not specifically pleaded — Falsifications of accounts on footing of breach of trust — Executor's liability in respect of testator's contracts.

When a common account is ordered, if trustees seek to discharge themselves by payments which would amount to breaches of trust, such payments may be falsified and will be disallowed; notwithstanding that no breach of trust has been specifically pleaded.

In re Stevens, Cooke v. *Stevens,* [1898] 1 Ch. 162 at p. 172; and *Re Newland, Bush* v. *Summers,* (1904) 4 Sol. J. 14 followed.

When a testator entered into a contract for the erection of buildings on the property of a stranger, the stranger cannot claim to have the contract carried out at the expense of the testator's heirs in the absence of a special direction in the will. An executor is bound to take into consideration in each case whether the completion of the contract is for the benefit of the deceased's estate. If it would be more beneficial to the estate to break the contract and pay damages for non-completion of the contract, he ought to adopt this course; he could, of course, always apply to the court for directions if he so desired.

Sparke v. *Day,* [1898] 2 Ch. 510 followed.

REFERENCE BY REGISTRAR.

Mundell and *Battishill* for the trustee, A. M. S. Angullia.

Page for the plaintiffs, the present trustees of the testator's estate.

Cur. Adv. Vult.

In this action a common account was ordered to be taken and in his accounts the trustee included disbursements amounting to $20,978.96 in the following circumstances. The testator in his lifetime executed a voluntary settlement of some landed property. The settled property included vacant land. The testator in his lifetime entered into a contract to build houses upon the land. The capital money expended by him was being paid out of his own moneys and not out of the settled properties: and thus the money spent by the testator in building was an accretion to the property settled. The testator made no provision in his will for the completion of the buildings or for payment in respect thereof after the death of the testator, the executor on his own responsibility and without applying to the Court for directions proceeded to carry out the contract and to make all the payments thereunder at the expense of the estate. The beneficiaries falsified all these payments made by the executor contending that whereas the testator might be generous with his own property the executor had no business to be generous with property belonging to the beneficiaries under the will and that the executor ought to have made an arrangement with the beneficiaries of the settled property to take over the benefit of the burden of the contract and that if he was unable to do this he ought to have terminated the contract in which case the damages would necessarily have been very much less than the loss to the estate of the testator by carrying on and completing the contract. The Registrar referred the matter to the Judge and the reference came on for hearing on the 8th day of October, 1935.

Burton Ag. C.J.: This is a reference by the Registrar of this Court under Order 51 rule 20 upon a question which has arisen in the taking of the accounts of the sixth defendant's administration of the estate of Kavena Hadjee Mohamed Yoosuf, deceased. The facts have been fully set out in the judgments of the Court of Appeal in Civil Appeal No. 3 of 1935 and I do not propose to re-state them now. When Hadjee Mohamed Yoosuf died on the 18th July, 1928 he had entered into a contract with Tan Peck Hood to build six houses on the land he had settled on his infant son, Kader Ebrahim. These buildings were partly completed at his death and Angullia, the executor, spent $17,276 out of the deceased's estate to complete them. The question for determination now is whether Angullia is entitled to have this sum allowed in his accounts.

In Civil Appeal No. 3 of 1935 the Court of Appeal held that the property comprised in Kader Ebrahim's settlement did not pass to the executor at the death of the testator, and that the money spent upon the completion of the houses by Angullia was the testator's money spent for the benefit of the estate of a stranger.

The testator had before his death entered into a binding contract to complete these houses on the settled land; and when the executor took charge of the property, he was faced with the problem of this contract. He might have applied to the Court for directions, but he did not do so, and he decided on his own responsibility to complete the buildings at a cost of $17,276.

Mr. Battishill's first point was that the beneficiaries are volunteers and he cited in support of his argument *In re Stoneham,* (1919) 1 Ch. 149 at p. 158. But I do not think that I am now governed by that case, because the facts are different. In that case the gift was complete before the death. But in our case at the time of the death the gift was partly executory and partly executed. As to the part executed at the time [98] of the death no doubt the beneficiaries are volunteers; but they are not volunteers in respect of the executory part; the $17,276 which has been paid out is their money and that is the only part now in question. But Mr. Battishill's main argument rested on the case of *Cooper* v. *Jarman,* 3 Eq. 98, and the principle that it is the executor's duty to honour the contracts of the deceased. [98]

Lord Romilly M.R. says at p. 101:—

"I think it cannot be good law that an administrator is bound to do an injury and inflict damage upon a person with whom the intestate had entered into a contract, and to prevent that person from completing his contract, because, by so doing, he would increase the personal estate of the intestate."

and later on in the same page:—

"But I have seen no case, and I am unable to believe that any case can be found, where a legal personal representative has been made answerable for performing a contract entered into by the deceased person, and at the time of his death intended to be performed by him merely because, according to the peculiar rules of equity relating to the doctrine of specific performance, such a contract could not have been enforced by a suit in equity against the deceased person or against his representative. Here, unquestionably, the intestate had bound himself, as far as possible, during his lifetime. The house had been begun; the building was in progress when he died. If the Messrs. Lawrence had, therefore, refused to go on with the building, an action would have lain against them at the suit of the administrator; and it cannot, in my opinion, be law that the next-of-kin should be entitled to call upon the heir-at-law to resist the Messrs. Lawrence and hinder completing the contract because, in the opinion of the next-of-kin, the damage sustained by the contractor would possibly be less than the amount to be paid for the fulfilment of the contract."

These words, if divorced from their context and the particular facts of the case undoubtedly support Mr. Battishill's argument. But I do not think that I should be justified in so enlarging their application. The facts in the two cases are quite different. In *Cooper* v. *Jarman, supra,* the intestate had entered into a contract to build a house on his own land, not a stranger's; and the conflict is not in our case between the heir-at-law and the next-of-kin, but between the beneficiaries and a stranger. There is no analogy between the position of Kader Ebrahim and the heir-at-law. It is irrelevant that the stranger in this case happened to be the deceased's son.

Lord Romilly goes on to say at p. 102:—

"The administrator has, in my opinion, a clear duty to perform. The moral duty is distinct. It is to perform the contract entered into by his intestate."

But there is no moral obligation in our case either to the settled estate or to the contractor. I am not suggesting that any injury be done to the contractor. He would have been perfectly satisfied with a sum sufficient to compensate him for loss of expected profits. Moreover, it is clear that North J. in *Sprake* v. *Day,* [1898] 2 Ch. 510 did not understand that Lord Romilly meant as much as Mr. Battishill says he meant. The testator in that case had entered into a contract to build a house on some land situated at Misterton and belonging to Mrs. Sprake-Day, which had been conveyed to her absolutely during his lifetime. It was argued in that case that the principle of *Cooper* v. *Jarman, ubi sup.,* extends to a contract by a testator for the erection of buildings on land belonging to another person. But that would not even have been arguable if Mr. Battishill's interpretation of *Cooper* v. *Jarman* were correct; and North J. definitely negatives it, at p. 573:

"I do not see how a person who for this purpose is a stranger — the owner of the property before the testator's death and not taking it under his will — can claim to have a contract entered into by the testator with a builder to erect houses upon it carried out."

Kader Ebrahim, unlike the heir-at-law, had therefore no claim to have the contract carried out; and the building contractor could have been satisfied by a payment which must have been substantially less than the $17,276 paid. The testator had done no more than promise to make a gift to Kader Ebrahim; and that, though partly performed, could not be enforced. And, I think, the question of the executor's liability rests on the fact that he has completed a gift to Kader Ebrahim which the testator had partly performed in his lifetime and no doubt intended to carry out fully if he had lived. The case might have been different if the testator had set aside a fund for the purpose of completing this gift. He did not do so; indeed the assets of the estate were insufficient to carry out the contract, and Angullia raised the money to complete it by mortgaging the deceased's estate.

I think therefore that the Registrar should disallow this sum of $17,276. If Angullia had come to Court for directions at the time when he was appointed executor, it is possible that some arrangement would have been sanctioned to provide the money for completing this contract out of the funds of Kader Ebrahim's settled estate, and that the deceased's estate would have suffered no loss at all. But such a scheme would have required the co-operation of the trustee of Kader Ebrahim's property, and it is impossible to say now whether any such arrangement could have been made. I think therefore that at this stage the only fair course is for the Registrar to [99] allow Angullia [99] in his accounts such a sum as he thinks would have been fair to pay to Tan Peck Hood as compensation for the breach of the contract to build these houses if it had been broken at the death of Kavena Hadjee Mohamed Yoosuf.

Judgment accordingly.

From this judgment the 6th defendant appealed.

Mundell and *Battishill* for the appellant.

Braddell and *Page* for the respondent.

Huggard C.J.: This is an appeal by the 6th defendant from the decision of Burton Ag. C.J. given upon a reference to him by the Registrar under Order 51, rule 20.

The reference is in the following terms:—

"Whether or not the 6th defendant is to be allowed to include the sums of $17,276 and $3,702.96 interest in his accounts as executor of the estate."

The material facts may be briefly stated. Kavena Hadjee Mohamed Yoosuf (since deceased) executed on the 3rd January, 1927, an indenture of settlement in respect of portion of his property. In this case we are concerned with the property mentioned in the Third Schedule to the settlement, which property included certain pieces of land at Serangoon Road, Singapore. Under the terms of the settlement the settlor retained a life interest in the property, and he directed that after his death the trustees should apply the income to the payment of repairs and upkeep of the property and to the maintenance and support of the settlor's children, Maimoona and Kader Ibrahim, the second and third defendants, during their minority, and that on Kader Ibrahim attaining the age of twenty-one years the property was to vest in him absolutely. The trustees were the settlor himself and his wife Fatimah, the first defendant. The settlor reserved to himself the right to vary or revoke any part of the settlement by deed, and this power was in fact exercised in regard to some of the property by deed of the 20th February, 1928.

On the 15th July, 1927, the settlor entered into a contract for the erection of seven shop houses on this property at a cost of $52,000 but the contract appears subsequently to have been varied to the extent that only six houses were to be erected at a cost of $44,572.

The settlor died on the 18th July, 1928. Prior to his death considerable progress had been made towards the erection of the shop houses and over $28,000 had already been paid to the contractor, leaving a balance of some $16,000 still due to him subject to the due completion of the contract.

After the death of the settlor a document purporting to be his will was propounded by the present appellant who was named therein as trustee. Probate of this will was granted to the appellant on the 10th September, 1928, and he proceeded to administer the estate. Over three years later, however, on the 7th January, 1932, probate was revoked by Order of Court on the ground that the will had not been properly executed, but prior to the revocation of probate the present appellant, in his capacity as executor, had expended the sum of $17,276 on the completion of the shop houses.

After probate had been revoked the present respondents were appointed administrators of the estate, and on the 16th May, 1934, they took out an originating summons (No. 66 of 1934) for the determination, *inter alia*, of the following question :—

> " Since monies totalling $17,276 have been expended after the death of the settlor by the 6th defendant (the sole executor of an alleged will of the settlor which has been revoked, set aside and cancelled by this Court) on completing six shop houses on certain vacant lands which are comprised in the abovementioned settlement, do such monies fall to be paid out of the properties comprised in the settlement or by the beneficiaries thereof, or must they be paid out of the estate in respect of which the settlor died intestate?"

This question eventually came before the Court of Appeal on appeal from the decision of Prichard J. and it was held that the monies did *not* fall to be paid out of the properties comprised in the settlement. As regards the alternative question, whether the monies must be paid out of the estate in respect of which the settlor died intestate, although Thomas C.J. (F.M.S.) expressed the opinion that the settled estate was entitled to have the shop houses completed at the cost of the intestate's estate, it would appear that this question was not argued either before Prichard J. or before the Court of Appeal and the other members of the latter Court (Burton Ag. C.J. and Terrell J.) expressly refrained from expressing any opinion upon it. The judgments of the Court of Appeal were delivered on the 3rd July, 1935.

Then, on the 9th July, 1935, the present appellant was ordered to file supplementary accounts, and on the 15th July Burton Ag. C.J. gave leave to all parties to surcharge and falsify the present appellant's account in respect of items relating to the six shop houses built on the settled lands.

On the taking of accounts subsequently by the Registrar the question set out at the beginning of this judgment was, apparently with the concurrence of all parties, referred for the opinion of a Judge. In substance the question so referred is the alternative question which was left unanswered in Originating Summons No. 66 of 1934, namely, whether the monies expended by the present appellant on the completion of the shop houses can properly be charged against the estate in respect of which the settlor died intestate. On this reference Burton Ag. C.J. directed the Registrar to disallow the sums of $17,276 and $3,702.96 save and except such [100] sum, with interest thereon, as the Registrar should consider would have been fair to pay to Tan Peck Hood, the contractor, as compensation for breach of the contract to build the houses, on the assumption that the contract had been broken at the date of the death of the settlor. It is from that decision that this appeal has been taken. [100]

It will be convenient to deal in the first instance with the seventh ground of appeal, which is in the nature of a preliminary objection and is to the effect that it was not competent in these proceedings to charge the appellant with breach of trust. On this ground of appeal Mr. Mundell for the appellant has argued that the items relating to the erection of the shop houses can only be falsified on the footing of a breach of trust on the part of the appellant, and as breach of trust has not been specifically pleaded he cannot be charged with it in these proceedings. In support of this argument Mr. Mundell urged that if breach of trust had been specifically pleaded he could have pleaded acquiescence or claimed relief under the Trustees Ordinance, but he cannot raise such defences as those in the present proceedings. I have not been able to find any authority which would go to show that an item of this nature cannot properly be attacked on the taking of common accounts without a specific charge of breach of trust. On the contrary it is stated as follows in *Halsbury* (2nd ed.) Vol. 14, p. 446, para. 653 :—

> " Where the account directed by the order is what is called a common account, the representative is bound not only to bring in an account of his receipts, but to discharge himself as regards those receipts, and show what he has done with the money received; and in taking the account disbursements made by him in breach of his fiduciary duties will be disallowed."

In the note to this paragraph the cases of *Re Stuart; Smith* v. *Stuart,* 74 T.L.R. 546, and *re Newland; Bush* v. *Summers,* 49 Sol. J. 14 are cited and the note proceeds as follows :—

> " To this extent, accordingly, a breach of trust can be gone into in proceedings commenced by originating summons. In taking an account all just allowances are to be made without any direction for that purpose."

This view finds further support in the following observation of Chitty L.J. in *re Stevens, Cooke* v. *Stevens,* [1898] 1 Ch. 162 at p. 172 :

> " I pause for a moment to say that, on taking the common account of their receipts, executors can properly be, and are often, charged with a *devastavit* arising on the accounts themselves . . . On taking the account they stand charged with their receipts; and if they seek to discharge themselves by lawful payments, their discharge is disallowed."

It seems to me that this seventh ground of appeal must be regarded as an afterthought on the part of the appellant. It is true that the point was referred to, apparently very briefly, by Mr. Battishill at the conclusion of his argument before Burton Ag. C.J. in the Court below; but prior to that there was the order (which I have already mentioned) of Burton Ag. C.J.

of the 15th July, 1935, when the appellant was represented, and when it was ordered that all parties, other than the present appellant, should be at liberty to surcharge and falsify the present appellant's account in respect of items relating to the six shop houses built on the settled lands. That order was not appealed from. Then, further, at the taking of the accounts by the Registrar, the following facts were agreed to by all parties:—

(1) that a contract existed at the date of the death of the settlor;

(2) that the contract was completed by the present appellant; and

(3) that the sum of $17,276 was expended on completion of the contract and a sum of $3,702.96 represents interest on that sum.

and the Registrar then, apparently without objection on the part of the present appellant, referred for the opinion of a Judge the question whether or not the present appellant should be allowed those sums in his accounts. On these facts it may well be suggested that if the appellant wished to raise the point represented by the seventh ground of appeal he should have raised it at a much earlier stage of the proceedings than he has done.

In my opinion, however, there is no substance in this particular ground of appeal and it must fail.

Turning now to the main question which arises on this appeal, the appellant, in contending that he was bound to complete this building contract and is therefore entitled to be allowed in his accounts the amounts mentioned above, relied, both in this Court and in the Court below, on the decision in *Cooper* v. *Jarman*, 3 Eq. 98. In that case a person had contracted with a builder to erect a house on a piece of freehold land belonging to him, and he died intestate before the house was finished. It was held by Lord Romilly M.R. that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate. Now when one reads the judgment of Lord Romilly in that case it would appear to support strongly the appellant's contention in the present case. But Lord Romilly's judgment was considered in the later case of *In re Day, Sprake* v. *Day*, [1899] 2 Ch. 510, and it is clear from the decision of North J. that Lord Romilly's observations in *Cooper* v. *Jarman* must be read in the light of the facts of that particular case. In *Sprake* v. *Day* the facts were these: the
[101] [101] testator had entered into a contract for the erection of some cottages upon certain property, which under his will passed to Mr. Sprake-Day and her daughter. The testator had also entered into another contract for the erection of a house on some land situate at a place called Misterton, this land being the property of Mrs. Sprake-Day. At the time of the testator's death neither of these contracts had been completed, and Mrs. Sprake-Day and her daughter claimed to have both contracts completed at the cost of the testator's personal estate. It was held by North J. that, as regards the contract for the erection of buildings on the land belonging to the testator, and which passed under his will, the decision in *Cooper* v. *Jarman* applied and the devisees were entitled to have the contract completed at the cost of the estate; but that, as regards the contract for the erection of buildings on the Misterton property — that property not belonging to the testator but to a stranger—the decision in *Cooper* v. *Jarman* did not apply and Mrs. Sprake-Day was not entitled to have that contract completed at the cost of the testator's estate. In his judgment North J. said, dealing with the Misterton property contract, at p. 513:—

> "I can understand that there might be circumstances under which he (i.e. the testator) would have been bound to carry out such a contract, by reason of some consideration moving from her (i.e. Mrs. Sprake-Day) to him to induce him to undertake the liability. But the evidence which has been adduced does not establish any liability of that kind, and I do not see how a person who for this purpose is a stranger — the owner of the property before the testator's death and not taking it under his will — can claim to have a contract entered into by the testator with a builder to erect houses upon it carried out."

It appears to be clear from the decision in *Sprake* v. *Day* that the distinction drawn by North J. between the two contracts was based on the fact that one property belonged to the testator and passed under his will, whereas the other property, the Misterton property, belonged to a stranger. In other words, in one case the completion of the contract benefited the estate of the testator, in the other case there was no such benefit. In the former case the decision in *Cooper* v. *Jarman* therefore applied; in the latter it did not. The test to be applied in each case is whether the completion of the contract is for the benefit of the deceased's estate.

Now in the present case the settlor, prior to his death, had parted with the ownership of the property in question, retaining to himself only a life interest; so that at the date of his death the property belonged to "a stranger" as defined by North J. in *Sprake* v. *Day*. In the Court below the learned Acting Chief Justice considered that he was bound by the decision in *Sprake* v. *Day* as in the Misterton property, and he accordingly directed the Registrar to disallow the sums spent by the appellant in completing the contract.

Mr. Mundell for the appellant invited this Court to disregard the decision in *Sprake* v. *Day* as to the Misterton property on the ground that North J. had failed to appreciate the principle underlying the decisions in the earlier cases of *Holt* v. *Holt*, 93 E.R. 808 and *Cooper* v. *Jarman, supra*. Mr. Mundell's contention is that those earlier decisions could only have been based on the principle that when the contract had been entered into there had been a conversion of money into land; that this fact was overlooked in *Sprake* v. *Day*; and that therefore *Sprake* v. *Day* was wrongly decided. I have examined very carefully the reports of the cases relied upon by Mr. Mundell and I am not satisfied that his contention is sound. Even assuming for the purposes of the argument that a contract to erect a building is equivalent to a contract to purchase land, it is clear that the doctrine of conversion can apply only if the contract is one which the Courts would enforce. Where no specific performance of a contract is possible there is no conversion (*White & Tudor*, 9th ed. Vol. 1, p. 305). In the present case clearly there was no contract which could have been specifically enforced against the settlor at the date of his death. At the very most the contractor might have had an action for damages for non-completion of the contract.

The case of *Sprake* v. *Day* was decided by a distinguished Judge after hearing elaborate arguments by most eminent counsel, and it can hardly be supposed that the doctrine of conversion, if it applied, would not have been referred to either in the arguments or the judgment. The principles laid down in that case have remained undisturbed for nearly forty years and I am personally not prepared to dissent from them.

Mr. Mundell also sought to distinguish *Sprake* v. *Day* from the present case by arguing that here the doctrine of advancement applies. It may be observed that no such argument was advanced in the Court below. His argument on this point was based on the general proposition that where a person buys property in the name of his child there is a presumption that it was his intention to make a gift to that child. But in order that the doctrine of advancement should apply it must appear that the gift was a complete gift or that there is a contract which can be specifically enforced. It seems to me that the circumstances here negative any question of advancement. The settlor entered into a contract, which he had power to vary and did in fact vary, for the erection of houses on lands in which he had retained a life interest and which, under the terms of the settlement, might never vest in his son at all. In these circumstances I cannot see how the contract to erect the houses could be regarded as a gift to the son. And, as I have already said, the contract was one which could not be specifically enforced.

[102] [102] For these reasons I agree with the conclusions of the learned Judge in the Court below. I think that this appeal should be dismissed with costs.

The deposit may be paid out to the respondents or their solicitors in part satisfaction of costs.

Whitley J.: I have had the advantage of reading the judgments of the learned Chief Justice and of my brother Terrell J. with which I agree and I have little to add.

I felt at first some difficulty with regard to the seventh ground of appeal, but when it is analysed I am satisfied that the appellant has no substantial ground of complaint. His contention on this point would appear to be that the appeal must be allowed because in the course of the proceedings before the Registrar and the learned trial Judge two questions which might entitle the appellant either to full or partial relief were not raised, argued or considered those questions being whether the appellant should be given relief under section 60 of the Trustees Ordinance and whether he has any right to contribution as against any of the beneficiaries by reason of acquiescence on their part. Admittedly those questions have not been considered, but it was for the appellant to raise them and he did not do so. Nor has he satisfied me either that he had no opportunity to raise them or that it is not still open to him to do so. All that the learned trial Judge was asked to do was to give his ruling as to whether or not the appellant should be allowed the sums in question in his accounts. The appellant raised no objection to this reference to the Judge by the Registrar and he must have realised that the allowance or disallowance of these payments must depend upon the view which the Court took as to whether they had been properly made or whether they constituted a *devastavit* or breach of trust. It seems clear, as the learned Chief Justice has pointed out, that such questions can properly be considered on the taking of common accounts and I should require strong authority to persuade me to accept Mr. Mundell's submission that whereas this may be the rule in the case of minor or obvious 'devastavits' other principles should apply in the case of more substantial and less obvious ones.

Mr. Mundell apparently appreciated the difficulties in the way of distinguishing the case of *Sprake* v. *Day, supra,* inasmuch as he felt constrained to ask us to hold that that case was wrongly decided. It is true that that case stands alone and has apparently not been referred to in any later case, but it is cited in the text-books as good law and has stood unchallenged for over thirty years. In that case when dealing with that part of the property which was devised for the benefit of Mrs. Sprake-Day and her daughter and which was held to be covered by *Cooper* v. *Jarman,* 3 Eq. 98 counsel invited the Court to treat this latter case as a case that stands by itself, and the observation of North J. may, I think, be aptly applied to the present suggestion that we should disregard *Sprake* v. *Day,* [1898] 2 Ch. 510. He said at p. 513 :—

> "It is said that that case stands by itself; but although, so far as I know, there has been no other case which supports it, on the other hand there is none against it, and it lays down an intelligible principle. It has been unreversed for a great many years, and though no doubt the point is one which does not often arise still there the case stands, and I must follow it."

It must happen very rarely that an executor takes such a risk as the appellant has done in this case — ordinarily he would seek the directions of the Court as to how such an uncompleted contract should be dealt with so that it is not surprising that similar cases have not since come up for consideration before the Courts. Moreover it seems to me that *Sprake* v. *Day* also lays down an intelligible principle and although in his judgment North J. does not expressly say so it would appear that his reason for distinguishing between the two uncompleted contracts in that case must have been that one was for the benefit of the testator's estate and the other was not.

It seems to me reasonable to assume that the learned Judge adopted the argument of counsel (*ibid.,* 512) and the main points of that argument are all apposite to the present case. Those points are so shortly stated that I will set them out.

> "As to the Misterton property, *Cooper* v. *Jarman* does not apply.....
>
> The applicants have no right to have the contract completed at the cost of the testator's estate.....
>
> He himself might have changed his mind.....
>
> Mrs. Sprake-Day was a mere volunteer, and as regards her the testator could have stopped the building whenever he pleased.....
>
> The land was her property, and there is no reference in the will to the building contract.....
>
> The specific performance of a building contract cannot be enforced; the builder's only remedy is by way of damages for non-completion.....
>
> The contract was not for the benefit of the testator's estate....."

If one substitutes for "Mrs. Sprake-Day" and "applicants" the corresponding parties in the present case each of those points becomes equally applicable here and I do not see how that case can be distinguished.

I agree with the proposed order of the learned Chief Justice.

[103] [103] **Terrell J.:** The facts of this case are not in dispute. On the 15th July, 1927 the deceased Kavena Hadjee Mohamed Yoosuf entered into a contract with one Tan Peck Hood for the erection of seven shop houses upon certain vacant land in Serangoon Road. The land in question was included in a settlement made by the deceased on the 3rd June, 1927. The trustees of the settlement were the deceased and the first defendant, and so far as this land was concerned, the deceased reserved for himself a life interest, with trust in favour of the third defendant after his death, and in the event of his son, the third defendant, not attaining 21, there were substitutional trusts in favour of the deceased's wife, the first defendant, and his daughter, the second defendant. The deceased also reserved to himself a power of revocation. The deceased died on the 18th July, 1928 without having revoked the settlement and without having completed the houses, six only of which were in course of erection. The sixth defendant, the appellant, was executor under a will which was in 1932 declared invalid. In the meantime he completed the six houses at a cost of $17,276 and for this purpose mortgaged some of the deceased's unsettled property. The interest to be allocated to the amount spent on the completion of the houses is agreed at $3,702.96 (p. 44 of the record).

The appellant first of all treated the settled and unsettled property as a single fund. Later accountants were called in; they separated the items and showed the amount spent on completing the houses as a debt due by the settled to the unsettled estate.

After the will had been declared invalid the plaintiffs were appointed administrators and took out this originating summons, No. 66 of 1934, asking for determination of the question whether the amount expended on the completion of the houses should fall on the settled or on the unsettled estate. Prichard J. held that the settled estate should pay, but this decision was reversed by the Court of Appeal on the 3rd July, 1935 and it was decided that the settled estate was not liable (Singapore Appeal No. 3 of 1935). The question whether the expenses should fall on the unsettled estate or on the 6th defendant personally was left open.

The order of Prichard J. dated the 10th October, 1934 also directed that the sixth defendant should account for the intestate personal estate come into his hands while acting as executor. No appeal was lodged against this part of Prichard J.'s judgment and the usual order to proceed with the account was made by the Registrar on the 2nd November, 1934. In pursuance of this order the sixth defendant filed his accounts which were exhibited to his affidavit of the 20th December, 1934. In such accounts the sixth defendant showed that a certain sum was due by the settled estate to the intestate estate (p. 29 of the record).

Further accounts were filed by the sixth defendant and the plaintiffs and the other defendants filed falsifications; and on the 26th September, 1935 the accounts and falsifications were considered by the Registrar. It then appeared that the only points in dispute were whether the sixth defendant was to be allowed the two sums of $17,276 and $3,702.96 for interest above referred to. It will be seen that the sixth defendant having failed to charge the expenditure for the completion of the houses against the settled estate, now attempted to get credit for the sums thus expended in passing his accounts of the intestate estate. At this stage the Registrar, under Order 51, rule 20, referred it to the High Court to determine whether the sixth defendant was to be allowed to include the disputed items in his accounts. The reference came before Burton Ag. C.J., and on the 10th October, 1935 the learned Judge directed the Registrar to disallow the sums of $17,276 and $3,702.96 in the sixth defendant's accounts subject to certain deductions. It is against this order that the sixth defendant has appealed.

Now the first ground of appeal argued by Mr. Mundell (No. 7 in the Memorandum) was that in objecting to the two items in question the plaintiffs and the other defendants were in effect charging the sixth defendant with a breach of trust and that it was not competent so to charge him unless the Court had previously declared that a breach of trust had been committed. For several reasons I do not think that there is any substance in this objection. In passing executors accounts some of the items objected to might come under the heading of a *devastavit*, or in other words a breach of trust, but that would not prevent the Court from considering the objections. I would refer to the following passage from the judgment of Chitty L.J. in *In re Stevens*, [1898] 1 Ch. 162 at p. 172:

> "I pause for a moment to say that in taking the common account of their receipts, executors can be, and often are, charged with a *devastavit* arising on the accounts themselves. On taking the account, they stand charged with the receipts, and if they seek to discharge themselves by unlawful payments, their discharge is disallowed."

The same objection might be raised in the case of every single item falsified, and if the Registrar could not allow a falsification on this ground, the whole proceedings would have to be duplicated, and it would be useless for the Registrar to take the accounts at all.

Then again the appellant never objected to the procedure which has been adopted. When Prichard J. made his order of the 10th October, 1934 the appellant knew he would have to account, and that the parties interested would be entitled to surcharge and falsify, and on the 2nd November, 1934 and again on the 9th July, 1935 orders were made expressly giving the [104] plaintiffs and the other defendants liberty [104] to surcharge and falsify and the appellant has submitted to these orders. Again on the 25th August, 1935 while the accounts were pending before the Registrar, Messrs. Sisson & Delay, the appellant's solicitors, wrote to all the other parties (p. 27 of the record) pointing out that the falsification raised two questions, the second of which (b) was whether the appellant was entitled to be reimbursed out of the intestate estate for his expenditure on the settled estate. Then they say:—

"As regards question (b), it is suggested that if the beneficiaries intend to dispute Mr. Angullia's rights to be reimbursed out of the estate, which we presume they do, this question should be brought before the Court on originating summons or by a summons in the present proceedings at once."

In substance this suggestion was adopted although, instead of a separate summons, the matter was simply referred to the High Court by the Registrar under Order 51, rule 20. It appears to me therefore that it is not open to the appellant to object to the manner in which this question has been brought before the Court, and that in view of what has happened, his objection is in any case far too late.

The procedure adopted has been perfectly simple and straightforward. The executor is charged with certain receipts and he attempts to discharge himself by certain payments. As regards the two items in question, the plaintiffs say that the payments are not justified and it is for the Court to say whether they were justified or not. It may be observed that exactly the same procedure appears to have been followed in *Cooper* v. *Jarman,* 3 Eq. 98. The defendant was administrator and also heir-at-law. He completed the houses and in his administrator's accounts he credited himself with the cost of such completion, and on taking his accounts the next-of-kin questioned this particular item. It is of course open to the executor to argue that the expenditure was justified and he did so argue before the Registrar, before Burton J. and in the Court of Appeal. If the payment was justified naturally there was no breach of trust, but I can see no ground for the argument that because the issue of breach of trust might have been raised in a different manner, the Court cannot decide whether the executor should or should not be allowed these particular payments, especially when the executor has never until now objected to the manner in which this particular issue has come before the Court.

Mr. Mundell further argued that if the plaintiffs had commenced proceedings by writ claiming a declaration that the appellant had been guilty of certain breaches of trust, various defences might have been raised, such as acquiescence by certain of the beneficiaries, with a claim for contribution. The appellant might also have asked to be relieved under the provisions of the Trustees Ordinance. It is no doubt true that if the proceedings had been commenced differently they would have taken a different course, but I see no difficulty in the questions referred to being raised either in these or in separate proceedings. If necessary, the order of this Court could specifically declare that the sixth defendant is to be at liberty to raise by appropriate proceedings any matters which would have been open to him by way of defence if he had originally been charged with breach of trust in respect of the items disallowed.

As regards the main ground of appeal, I feel unable to distinguish *Sprake* v. *Day,* (1898) 2 Ch. 510. It is true that this judgment is not binding on this Court, but for myself I should feel reluctant to differ from a decision of the Court of Chancery which has remained undisputed for nearly 40 years even if I considered the decision were wrong. But on principle I respectfully agree with the decision of North J. I think that the distinction drawn by Mr. Braddell between *Cooper* v. *Jarman,* 3 Eq. 98 and the case of and the case of *Sprake* v. *Day* so far as concerns the Misterton property is correct, namely that the executor should perform the deceased's contract where such contract is for the benefit of the property the deceased died possessed of, but that he should not perform such contract where the land is that of a stranger. In the case before the Court, as in the case of *Sprake* v. *Day* the deceased had contracted to build on land which he had originally owned but which he had alienated. In this connection the fact that in the present case the deceased had made a settlement reserving to himself a life interest and a power of revocation appears to me to be immaterial. What the Court must consider is the situation when he died. The life estate had lapsed, the power of revocation had not been exercised, and the property was vested in another, not by virtue of his will, but by virtue of the settlement previously made. In the case of *Sprake* v. *Day,* Mrs. Sprake-Day asked for a declaration that she was entitled to have the contract completed at the expense of the estate, and the Court held that she was not so entitled.

Following the authority of that case, the surviving trustee of the settlement in this case could not have compelled the appellant to complete the buildings at the cost of the unsettled estate. That being the position I cannot see how the executor was justified in diverting the estate of the intestate for the benefit of a stranger — using 'stranger' in the sense that the beneficiaries under the settlement did not derive their interest under the will or on an intestacy.

Mr. Mundell, however, put forward two other arguments. The first was that as soon as the deceased entered into the contract there was a conversion and that in some way the liability for the cost of the houses became part of the settled estate. Mr. Mundell argued that *Holt* v. *Holt,* 23 E.R. 808, and *Cooper* v. *Jarman,* 3 Eq. 98 [105] were both decided on the [105] principle of conversion, but from an examination of the reports this is not so. In *Holt* v. *Holt* it was merely decided that the administrators were obliged to perform the deceased's contract to build a house on land which had passed to the heir and conversion was not mentioned. In *Cooper* v. *Jarman,* the doctrine was only referred to in the course of argument when counsel submitted that there could be no conversion where a contract would not specifically be enforced. Lord Romilly did not dispute this proposition but decided on a different ground — namely, that quite apart from any question of specific performance, the heir was entitled to have the house completed. Lord Romilly appears to put it as a matter of convenience and held that a legal personal representative could never be held liable for carrying out a contract entered into by the deceased. The proposition is not accepted *in toto* in the later case of *Sprake* v. *Day* where North J. limited the legal personal representative's obligation to the land which had been the deceased's at the time of his death, but the doctrine of conversion was not referred to either in the judgment or the argument of counsel.

The doctrine of conversion was of importance in England, before the Administration of Estates Act, 1925 because property might descend either to the heir-at-law or to the next-of-kin according as to whether there had been a conversion or not. In this Colony no question between the heir and the next-of-kin could ever arise, and the doctrine is only material in the matter of the construction of wills, where a testator has bequeathed his movable and immovable property to different persons. But even under the old law, in cases of contracts, it was essential that there should have been a contract which could have been enforced against the deceased. (*White & Tudor*, 9th ed., Vol. 1, p. 305). From this it follows that there must have been someone who could enforce the contract. In the case of the deceased's contract with Tan Peck Hood, even the builder could not enforce the contract — he could only — claim damages if the contract was broken. Neither the deceased's co-trustee nor the presumptive beneficiaries under the settlement could enforce the contract because they were not parties to it and in fact the deceased was the only person interested by virtue of his life estate and of his power of revocation. When the contract was made he was both the person liable on the contract and also entitled to the benefit of it, and the money which had not yet been spent was, therefore, in the words of Lord Eldon, "at home," *Wheldale* v. *Partridge*, 32 E.R. 341, and in such cases the person who held the money was, notwithstanding any contract or trust, deemed in law to hold it unconverted. It is quite clear, therefore, that even in England before 1925 the essential conditions upon which only would a Court of Equity have declared a conversion, were entirely lacking. The deceased might of course have bound himself for valuable consideration to carry out a contract on a stranger's land. Such a possibility is suggested by North J. in *Sprake* v. *Day*, [1898] 2 Ch. 510 at p. 513. In the present case the deceased's co-trustee might have entered into a contract upon a promise by the deceased to indemnify her or the deceased might have set aside the whole of the fund required for building the houses and declared himself a trustee of the fund for the benefit of the persons entitled under the settlement. In the one case the estate of the deceased would have been liable because of the contract to indemnify, and in the other because of the declaration of trust, but in neither case would the doctrine of conversion have had any bearing upon the matter whatever.

Mr. Mundell's arguments that the contract was an advancement or an imperfect gift are, I think, equally misconceived. It might be sufficient to point out that these arguments were never raised in the Court below, nor do they form part of the appellant's grounds of appeal, but on their merits the arguments are quite untenable. It should be pointed out that 'advancement' or 'imperfect gift' involve quite different principles of equity. As regards the doctrine of advancement, this arises when a property is purchased in the name of a stranger when there is generally a presumption that the person in whose name the property is purchased is a trustee for the person who paid the purchase money. In the case of a wife or child, however, the presumption is the other way, namely that the purchase is for the benefit of the person in whose name the purchase is made. The doctrine can apply where the transaction has actually been completed or where, as in *Drew* v. *Martin*, 71 E.R. 441 the contract could be specifically enforced. It obviously cannot apply to money that has not yet been advanced and where there is no binding contract which could be enforced. As regards the argument that the building contract was an imperfect gift, Courts of Equity are reluctant to construe an imperfect gift as a declaration of trust (*White & Tudor*, 9th ed., Vol. II, p. 806). As Turner L.J. said in *Milroy* v. *Lord*, 45 E.R. 1185 :—

> ".....I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything, which according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual and it will be equally effectual if he transfers the property to a trustee for the purpose of the settlement, [106] or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried."

[106]

In this case the deceased clearly did nothing to shown an irrevocable intention to benefit the persons who might be entitled under the settlement. His intention may have been to revoke the settlement when the buildings were completed and benefit himself. He did not set aside a particular fund, he made no declaration of trust, and made no contract or agreement even with his co-trustee. In these circumstances equity will not intervene.

I would accordingly dismiss the appeal with costs. The deposit should be paid to the respondents or their solicitors on account of their taxed costs.

Appeal dismissed.

Solicitors : *Sisson & Delay; Allen & Gledhill.*

Re KAVENA HADJEE MOHAMED YOOSUF, DECD. (No. 2)

ESTATE & TRUST AGENCIES (1927) LTD. v. FATIMAH SHAM BINTE HADJI SAHIB & ORS.

[O.C.J. (Terrell J.) March 2, 1936]
[Singapore Originating Summons No. 66 of 1934]
[C.A. (Terrell J.) March 11, 1936]
[Singapore Civil Appeal No. 13 of 1935]

Courts Ordinance, 1934, s.27 — Civil Procedure Rules, 1934 — O.57, r.3 — O.57, r.18 — Powers of single Judge — Appeal against interlocutory order.

A single Judge sitting as the Court of Appeal can make any order that could be made by the full Court on an application for leave to appeal to the Privy Council (except an order giving leave to appeal against an interlocutory order) but this does not give a single Judge power to deal with an application to stay all proceedings in the action.